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In The
Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,
Petitioner,

vs.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari To The
Oregon Supreme Court

**BRIEF OF AMICUS CURIAE
BROWARD COUNTY, FLORIDA,
IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST OF AMICUS CURIAE

Broward County, Florida, a political subdivision of the state of Florida, is a local government charged with the responsibility of providing for the welfare of its citizens. This responsibility includes the requirement that Broward County make appropriate determinations as to what, if any, conditions should be imposed upon various uses of property located within its boundaries. This case is concerned with the standard to apply in making such determinations.

Because this brief is being submitted by the authorized law officer of a political subdivision of a state, consent for its filing by the parties is not necessary. Rules of the Supreme Court of the United States, Rule 37.5.

SUMMARY OF ARGUMENT

In order for a land use restriction to be valid it must substantially advance a substantial public purpose. The strength of the relationship between the condition imposed and the purpose it serves should not be viewed as an independent factor that must reach a certain level in order for the condition to be valid. Rather, as long as there exists a reasonable relationship between the condition and the purpose, the strength of the link should be viewed as a factor to consider in weighing governmental interests against private interests.

Under this approach, a more compelling connection might be required when the public purpose is substantial, but not of the highest order, or where the private interests are particularly strong. Conversely, a link of somewhat lesser strength might be sufficient when the governmental interest is of exceptional importance, when the interest is furthered in some unique or highly effective manner or when there is a minimal infringement of the private interests involved.

The fact that a public purpose must be substantial and that a condition must substantially further that purpose in no way means that the relationship between a condition and a purpose must itself also be "substantial." The contention that such a relationship should be required offers linguistic, but not logical, consistency. It calls for this Court to depart from its historic focus and to overemphasize one factor of the many that must be balanced in making appropriate decisions regarding land use.

The approach advocated by Broward County is consistent with the manner in which this Court has previously treated land use issues and allows for full consideration of the many variables inherent in determining such matters. It avoids locking governments and courts in the sort of rigid formula that this Court has consistently eschewed and provides a flexible approach that takes into account the needs, goals, concerns and realities of each particular locality.

ARGUMENT

WHEN A SUBSTANTIAL PUBLIC PURPOSE IS SUBSTANTIALLY FURTHERED BY A LAND USE RESTRICTION, THE EXISTENCE OF A REASONABLE RELATIONSHIP BETWEEN THE RESTRICTION AND THE PURPOSE CONSTITUTES A SUFFICIENT BASIS TO WEIGH THE GOVERNMENTAL AND PRIVATE INTERESTS, WITH THE STRENGTH OF THE RELATIONSHIP CONSTITUTING ONE FACTOR TO CONSIDER IN THE WEIGHING PROCESS.

Land use regulation effects a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Thus, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transp. Co. v. New York City*, 430 U.S. 104, 127 (1978). The determination of when property has been taken "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S. at 261.

As noted in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court has not "elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies that the former 'substantially advance' the latter." *Id.* at 834 (footnote omitted).

This Court in *Nollan* concluded that a permit condition that serves the same legitimate police-power purpose as a refusal to issue a permit is not a taking if the refusal to issue the permit would not have constituted one. This evident constitutional propriety disappears, however, if the condition substituted for the prohibition "utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. When that is the case, the "essential nexus is eliminated." *Id.* Despite setting forth these principles, this Court in *Nollan* did not address the question of "how close a 'fit' " between the condition and

the governmental interest is required, finding the conditions in the case to be invalid under even the most untailored standards. *Id.* at 838.

Broward County suggests that when it is shown that a substantial public purpose is substantially furthered by a condition, it is appropriate to weigh the public and private interests if the condition is reasonably related to the governmental interest. The weighing process would then take into account the question of how substantial the relationship is under the facts of each particular case. Such a flexible standard would be consistent with the manner in which this Court has historically examined questions of this nature. It would also constitute a far more workable and realistic standard than the "substantially related" test urged by Petitioner, given the panoply of variables that are inherent in issues of this nature.

As discussed above, the focal points of this Court's pre-*Nollan* cases were the nature of the interest asserted and the question of whether that interest was furthered by the condition in question. Thus, this Court established the requirement that the interest be "substantial" and the requirement that it be "substantially" advanced.

The existence of these two "substantiality" requirements in no way means, or even implies, that the relationship between conditions and governmental interests must also be "substantial." Any argument to that effect would seem to be premised more on linguistic consistency than on precedent.

This Court's analysis has consistently demonstrated that when the government demonstrates that the two "substantiality" concerns are met, there exists a basis to warrant the balancing of the governmental versus the private interests. See, e.g., *Agins* (scenic zoning); *Penn Central* (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning). The strength of the nexus between the conditions and purposes has thus not constituted a separate criterion to be met by the government. Rather, it is a factor to consider in the weighing process, a process that determines whether a regulation "goes too far" and thus becomes "recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It is a facet of the "character of the governmental action," one of the

appropriate considerations in determining whether a restriction improperly forces a property owner to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

Such an analysis allows for the application of an appropriately flexible approach. When a governmental interest is substantial, but not of the highest order, when the interest is substantially furthered, but not as directly or effectively as possible, or when the private interest is particularly significant, a stronger link might be needed to uphold a condition. On the other hand, when a governmental interest is of exceptional importance, when the interest is furthered in some unique or highly effective manner, or when the private interest is minimal, a condition could be upheld when a link is of a somewhat lesser nature.

Clearly, when a condition "utterly fails" to further the governmental purpose, as in the example given in *Nollan* of a tax contribution of \$100 in order to shout fire in a crowded theater, 483 U.S. at 837, there is no basis to trigger a weighing analysis. Requiring the existence of a substantial relationship, however, could create many unjust results in cases in which minimal infringements on private interests can result in extraordinary public benefits. Adoption of the analysis urged by Broward County allows for full consideration of all facts and circumstances and the opportunity for a just result in all cases.

This approach is consistent with the general principles that have been established by this Court with regard to governmental regulation of land use. There is "no precise rule," *Agins*, 447 U.S. at 260, to determine questions of this nature, because there is "no 'set formula to determine where regulation ends and taking begins.'" *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Rather, such questions are treated as "turning upon the particular circumstances of each case," *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), and resolution of each case "ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

Perhaps the most basic concept that can be distilled from these authorities is that the Takings Clause of the Fifth Amendment "preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'" *Id.*, quoting *Penn Central*, 438 at 124, and *Goldblatt*, 369 U.S. at 594. These dictates are not well served by treating the nexus between a restriction and the public interest as an independent hurdle that must be surmounted in the abstract, without consideration of the context in which a case arises. Rather, the promotion of justice and fairness requires that the strength of the nexus, assuming a reasonable relationship is shown, be assessed within the process of balancing the interests involved.

One of the restrictions involved in the present case, the requirement that a strip of land be dedicated for a pedestrian/bicycle pathway, provides a vehicle to demonstrate the variety of variables inherent in issues of the sort presented here and the resulting need for flexibility in considering the strength of the link between a public interest and a condition imposed by government.

A pathway that is part of a comprehensive transportation system, as in the present case, *Dolan v. City of Tigard*, 317 Or. 110, 116, 854 P.2d 437, 440 (1993), serves a more substantial public purpose than one that is for recreational use only. A pathway that serves as a key link between a residential area and a business district would likely be more significant than the most outlying arm of a transportation system. The importance of such a system in an area in which the weather allows it to be used by residents all year might be greater than that of a system in a location in which the pathways would annually be covered with snow and ice for months at a time.

Variables affect not just the strength of the public purpose, but also the impact on the property owner. One such variable would be the purpose for which the property is being used. If, for instance, the business involved in the present case was a fast food restaurant or a bicycle shop, rather than an electric and plumbing supply business, chances are that the pathway would have a positive effect on business. If, on the other hand, there was a private residence on the property, the resident's interest in privacy would be a highly significant factor to

take into account. Other variables might include the manner in which the portion of the property to be dedicated for the pathway could otherwise be used, the percent of the total area of the property that is encompassed by the dedication and the question of whether the pathway would cause problems for the business located there.

The impact of a proposed land use change also produces variables. Will the expansion of a business, as here, bring more customers to the area and thus increase the traffic flow? Will such an effect occur from an increased number of employees working at the expanded business? Will the number of deliveries to the business increase to provide inventory to fill the added space? How will any increased traffic impact on the safety of bicyclists and pedestrians that presently travel through the area despite the lack of a pathway?

The nature of the particular restriction would also be assessed in weighing the interests. Obviously, a requirement that property be actually conveyed would generally call for a stronger nexus than a less intrusive restriction. Further, the risk that such a requirement would be for the purpose of avoiding the payment of compensation would constitute a significant factor to consider, satisfying the concern expressed by this Court in *Nollan*, 483 U.S. at 841.

Only when the nexus question is viewed in the context of variables such as these can it be considered fairly and justly. The nexus when a pathway providing a vital link in a transportation system cuts across an unused back corner of property on which a hamburger stand is located should not have to be of the strength required when a pathway built for recreational purposes traverses the entire width of the front yard of a private residence. Thus, flexibility is a requisite for appropriate determinations by the courts. The sort of rigid standard advocated by Petitioner would force the nexus issue to be considered abstractly, without reference to the factors that are the key to its determination.

It should additionally be realized that only by the adoption of a flexible standard such as that advocated in this brief can governments make realistic decisions as to what restrictions are acceptable. Every community is unique and needs to be able to tailor its decisions to its

individual circumstances. Moreover, the ripple effects of land use decisions, effects which may not be immediate, but which may arise from an immediate effect, are matters best weighed by the local decision makers. Land use decisions must take into account the needs, goals and concerns of the particular locality. If governments are required to consider potential restrictions handcuffed by an antiseptic legal framework and divorced from the realities of their own circumstances, their determinations will carry the veneer of justice and fairness, but lack the soul of those concepts.

CONCLUSION

"The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark'." *Williamson Planning Commission v. Hamilton Bank*, 473 U. S. 172, 199, n. 17 (1985), citing C. Haar, *Land-Use Planning* 766 (3d ed 1976). This Court has consistently eschewed formula approaches to this search, *McDonald, Sommer & Frates*; *Agins*; *Penn Central*; *Goldblatt*, calling instead for an "exercise of judgment," *Andrus*, 444 U. S. at 65, governed only by the dictates of "justice and fairness." *Id.*; *Penn Central*, 438 U.S. at 124; *Goldblatt*, 369 U. S. at 594. In order to achieve these goals, courts and governments require the flexibility to include in the process of balancing the governmental and private interests the strength of the nexus between a land use restriction and its public purpose.

Justice and fairness are fragile concepts. When constructed in a vacuum, they can appear as substantial as a brick wall, but in the glare of reality they can turn out to be made of papier mâché. Requiring the nexus to be considered as an independent issue, rather than weighed along with all the variables that exist in a given case, is to take the chance that the wall of justice and fairness appearing from the sterile legal analysis may prove to be false. The weighing process, on the other hand, feels, prods, kicks, pokes and tests the wall. It determines what it is made of and substitutes brick when papier mâché is found.

In the present case, there clearly existed a reasonable relationship between conditions imposed and the substantial public purposes they served. The Oregon Supreme Court therefore properly rejected Petitioner's claim that a higher standard was required in order to weigh the governmental interests against the private interests. Its decision should be affirmed.

Respectfully submitted,

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